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# **Civil Justice Committee Meeting**

**February 22, 2006  
10:15 AM - 12:00 PM  
24 House Office Building**

**Allan G. Bense  
Speaker**

**Mark Mahon  
Chair**

# **Committee Meeting Notice**

## **HOUSE OF REPRESENTATIVES**

**Speaker Allan G. Bense**

### **Civil Justice Committee**

**Start Date and Time:** Wednesday, February 22, 2006 10:15 am

**End Date and Time:** Wednesday, February 22, 2006 12:00 pm

**Location:** 24 HOB

**Duration:** 1.75 hrs

#### **Consideration of the following bill(s):**

HB 329 CS Adult Protective Services by Culp

HB 519 Internet Screening in Public Libraries by Kravitz

HB 567 Notaries Public by Kyle

HB 673 Residential Tenancies by Stargel

**NOTICE FINALIZED on 02/10/2006 13:39 by Hay.Tracey**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 329 CS                      Adult Protective Services  
**SPONSOR(S):** Culp; Gibson, H.; Sobel  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** SB 1182

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Elder & Long-Term Care Committee	7 Y, 0 N, w/CS	DePalma	Walsh
2) Civil Justice Committee		Blalock	Bond
3) Health Care Appropriations Committee			
4) Health & Families Council			
5) _____			

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### SUMMARY ANALYSIS

Chapter 415, F.S., provides for adult protective services and establishes a program of protective services for all physically and mentally disabled adults or elderly persons in need of them.

This bill amends the Adult Protective Services Act to allow the Department of Children and Family Services explicit authority to protect persons from the effects of self-neglect by redefining the term "neglect", and redefines the term "abuse" to include abuse by a relative or household member.

This bill further amends the Act by including the Agency for Persons with Disabilities among the list of departmental agencies, employees and agents with access to all records concerning reports of abuse, neglect, or exploitation of the vulnerable adult, including reports made to the central abuse hotline, and all records generated as a result of such reports. This bill provides that DCF, AHCA, APD, and the Department of Elderly Affairs may use unfounded allegations of abuse, neglect, or exploitation collected through the central abuse hotline for employment screening purposes.

This bill also grants the Department of Children and Family Services, the Agency for Persons with Disabilities, the Agency for Health Care Administration, the Department of Elder Affairs, and the Department of Health or county agencies explicit authority to access information in the central abuse hotline and automated abuse information system for purposes of licensure or approval of treatment facilities for the developmentally disabled, nursing homes and intermediate, special services, and transitional living facilities, and home care for aging and disabled adults. This provision will allow DCF, APD, AHCA, and the Department for Elder Affairs to use unfounded allegations of abuse, neglect, or exploitation when granting licenses and approval for these services and treatment facilities.

The bill appears to have a minimal fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

## **FULL ANALYSIS**

### **I. SUBSTANTIVE ANALYSIS**

#### **A. HOUSE PRINCIPLES ANALYSIS:**

Provide limited government -- This bill increases the Department of Children and Families' (DCF) responsibility in carrying out the provisions in the Adult Protective Services Act by giving DCF explicit authority to protect persons from the effects of self-neglect and investigate alleged abuse of vulnerable adults by relatives and household members who are not in a caregiver role.

#### **B. EFFECT OF PROPOSED CHANGES:**

##### **Background -- Abuse and Neglect of Vulnerable Adults**

The Legislature has recognized that there are many persons in this state who, because of age or disability, are in need of protective services.<sup>1</sup> Chapter 415, F.S., the Adult Protective Services Act, provides statutory authority for the Department of Children and Families (DCF) to investigate reports of abuse, neglect, or exploitation of a vulnerable adult. "vulnerable adult" means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.<sup>2</sup>

The Adult Protective Services program is a system of specialized social services directed toward protecting vulnerable adults who are unable to prevent further instances of abuse, neglect or exploitation. The department sends staff to make an assessment of an individual's need for protective services after a reported allegation of abuse, neglect or exploitation is received by the central abuse hotline. Adult Protective Services includes four basic elements:

1. The on-site investigation of all reports of alleged abuse, neglect, or exploitation.
2. Determination of immediate risk to the vulnerable adult and the provision of necessary emergency services.
3. Evaluation of the need for and provision of ongoing protective supervision.
4. Provision or arrangement of ongoing protective services.

If a vulnerable adult is in danger of continued abuse, neglect or exploitation, staff from the Aging Services Program provides services through the authority of the Protective Supervision Program.

##### **Effect of the Bill -- Abuse and Neglect of Vulnerable Adults**

Besides the potential for being neglected or abused by a caregiver, there is also the potential for a vulnerable adult to neglect themselves due to their age or disability, or be abused by a relative or household member other than a caregiver. In Fiscal Year 2003-2004, DCF investigated 6,394 cases reported to the central abuse hotline that were verified or contained some indications of self-neglect (other than medical neglect).<sup>3</sup> Of these self-neglect cases, more than 40 percent involved persons 80 years of age and older. However, the current statutory definition of "neglect"<sup>4</sup> does not include neglect

<sup>1</sup> Section 415.101(2), F.S.

<sup>2</sup> Section 415.102(26), F.S.

<sup>3</sup> *Adult Protective Services Annual Report Fiscal Year 2003-2004*, Table F-6, Demographic Characteristics of Victims by Verified and Some Indication Maltreatments, Self-Neglect In Need of Services, Department of Children and Family Services, March 2005.

<sup>4</sup> Section 415.102(15), F.S. -- "neglect:" means the failure or omission on the part of the caregiver to provide the care, supervision, and services necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, that a prudent person would consider

caused by the vulnerable adult, and the department's authority to provide services upon occurrence of self-neglect has been questioned by the courts.<sup>5</sup> In addition, the current definition of "abuse" only relates to caregivers and not to relatives or other household members.

This bill adds "vulnerable adult" to the definition of "neglect" in section 415.102(15), F.S., and adds "vulnerable adult in need of services"<sup>6</sup> to section 415.1051(1), F.S., relating to non-emergency protective services. These changes will give DCF explicit authority to provide voluntary services or petition the court for involuntary non-emergency services and protective supervision when an investigation determines that the vulnerable adult is neglecting himself or herself.

The Adult Protective Services Act defines "abuse"<sup>7</sup> in terms of willful acts committed or threatened by a "caregiver" that causes or is likely to cause impairment to a vulnerable adult's well-being. The statutory definition of "caregiver" found in Chapter 415 includes as a caregiver a person entrusted with the responsibility for the frequent and regular care of a vulnerable adult, and who has an agreement or understanding with that person or that person's guardian that a caregiver role exists.<sup>8</sup> Although the definition notes that a caregiver may include "relatives, household members, guardians, neighbors, and employees and volunteers of facilities ..." either an explicit or implicit caregiver relationship must be present for DCF to accept and investigate a report of abuse.<sup>9</sup>

During the 2000 Legislative session, s. 415.102(1) was amended to omit the requirement that a relationship exist between a vulnerable adult and the individual alleged to have committed acts or omissions evidencing abuse. Subsequently, in 2003 the Legislature again amended the Adult Protective Services Act to require the presence of a caregiver relationship before DCF could accept and investigate alleged abuse maltreatments.

This bill amends the definition of "abuse" in section 415.102(1), F.S. to include willful or threatened acts committed by a relative or household member which cause, or are likely to cause, significant impairment to a vulnerable adult's health. This change allows DCF to accept and investigate the alleged abuse of vulnerable adults by relatives and household members who are neither explicit nor implicit caregivers of such vulnerable adult.

### **Background -- Access to Reports and Records of Abuse, Neglect, or Exploitation of Vulnerable Adults**

Pursuant to s. 415.103, F.S., DCF maintains a central abuse hotline, which enables DCF to:

- Accept reports for investigation when there is a reasonable cause to suspect that a vulnerable adult has been or is being abused, neglected, or exploited;
- Determine whether the allegations made by the reporter require an immediate, 24-hour, or next-working-day response priority;
- When appropriate, refer calls that do not allege the abuse, neglect, or exploitation of a vulnerable adult to other organizations that might better resolve the reporter's concerns;

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essential for the well-being of a vulnerable adult. The term "neglect" also means the failure of a caregiver to make a reasonable effort to protect a vulnerable adult from abuse, neglect, or exploitation by others. "Neglect" is repeated conduct or a single incident of carelessness which produces or could reasonably be expected to result in serious physical or psychological injury or a substantial risk of death.

<sup>5</sup> *Florida Department of Children and Family Services v. McKim*, 869 So.2d 760 (Fla. 1<sup>st</sup> DCA 2004) (fact that allegedly vulnerable adult was suffering from results of self-neglect did not support order under Adult Protective Services Act of protective services, where definition of "neglect" required that neglect have occurred at hand of caregiver and statutory definition of "vulnerable adult" did not include concept of self-neglect.)

<sup>6</sup> "Vulnerable adult in need of services" means a vulnerable adult who has been determined by a protective investigator to be suffering from the ill effects of neglect not caused by a second party perpetrator and is in need of protective services or other services to prevent further harm. S. 415.102(27), F.S.

<sup>7</sup> S. 415.102(1), F.S.

<sup>8</sup> S. 415.102(4), F.S.

<sup>9</sup> Id.

- Immediately identify and locate prior reports of abuse, neglect, or exploitation;
- Track critical steps in the investigative process to ensure compliance with all requirements for all reports;
- Maintain data to facilitate the production of aggregate statistical reports for monitoring patterns of abuse, neglect, or exploitation; and
- Serve as a resource for the evaluation, management, and planning of preventive and remedial services for vulnerable adults who have been subject to abuse, neglect, or exploitation.

The Adult Protective Services Act imposes a mandatory reporting requirement on any person who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected or exploited.<sup>10</sup> In addition, the Act imposes a reporting requirement on any person who is required to investigate such reports, where there is a reasonable cause to suspect that a vulnerable adult died as a result of abuse, neglect or exploitation. In such instances, these individuals are required to immediately report their suspicion to the appropriate medical examiner, criminal justice agency, and to DCF.<sup>11</sup>

Current law provides that all records concerning reports of abuse, neglect, or exploitation of the vulnerable adult, including reports made to the central abuse hotline must be confidential and exempt from the public records statutes, unless specifically authorized in ch. 415, F.S.<sup>12</sup> Section 415.107(3)(a), F.S., provides that employees or agents of DCF, AHCA, or the Department of Elderly Affairs who are responsible for carrying out the following functions shall be granted access to all records except for the name of the reporter of abuse:

- Protective investigations;
- Ongoing protective services; or
- Licensure approval of nursing homes, assisted living facilities, adult day care centers, adult family-care homes, home care for the elderly, hospices, or other facilities used for the placement of vulnerable adults.

In October 2004, the Agency for Persons with Disabilities (APD) became an agency separate from the Department of Children and Families, specifically tasked with serving the needs of persons with developmental disabilities<sup>13</sup> and licensing facilities that provide care and services to the disabled. Prior to that time, it existed as the Developmental Disabilities Program within DCF. The Agency for Persons with Disabilities works in partnership with local communities to ensure the safety, well-being and self-sufficiency for more than 32,000 persons with developmental disabilities throughout Florida. The agency provides assistance to identify the needs of people with developmental disabilities and funding to purchase supports and services. Since APD is now its own agency and not a part of DCF, APD does not have access to abuse reports and records as it did when it was under DCF. APD employs people and contracts with outside agents who provide care and services for children and adults with disabilities. APD also is responsible for granting licenses for facilities providing room and board and personal care for persons with developmental disabilities.<sup>14</sup> APD believes that it needs access to such records to ensure that those employed by APD or that seek licenses through APD have not abused persons with disabilities in the past.

### **Effect of Bill -- Access to Reports and Records of Abuse, Neglect, or Exploitation of Vulnerable Adults**

<sup>10</sup> Section 415.1034(1)(a), F.S.

<sup>11</sup> Section 415.1034(2), F.S.

<sup>12</sup> Section 415.107, F.S.

<sup>13</sup> "developmental disability" means a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

<sup>14</sup> Section 393.067, F.S.

This bill inserts the APD into the list of agencies, departments, employees and agents contained in s. 415.107(3)(a), F.S. with access to records and reports of the Adult Protective Services. Therefore, under this bill, employees and agents of APD who are responsible for carrying out protective investigations, ongoing protective services, or licensure of facilities used for the placement of vulnerable adults would have access to all records and reports of abuse, neglect, or exploitation of a vulnerable adult. The definition of vulnerable adult includes adults with developmental disabilities. Therefore, this bill grants APD access to abuse reports and records of adults with disabilities, since APD is involved in the licensure of facilities used for the placement of vulnerable adults. It is unclear whether this section of the bill would allow APD access to abuse reports and records of children with developmental disabilities.

This bill also amends 415.107(8), F.S., to provide exceptions to the general rule that information in the central abuse hotline may not be used for employment screening. This bill provides that information in the central abuse hotline may not be used for employment screening, "except as provided in paragraphs (3)(a)<sup>15</sup> and (h)<sup>16</sup>". However, s. 415.107(3)(a), F.S., does not make any reference to allowing access to abuse reports and records for the purpose of pre- or post-employment screening. Section 415.107(3)(h), F.S. does provide for access to abuse reports and records for current employees screening, however, it does not make any provision for allowing access to these reports and records to APD. Therefore, it seems that this bill will not give APD access to information in the central abuse hotline for the purpose of employment screening.

This bill also amends s. 415.107(8), F.S., to provide that the following people and entities may use the information in the central abuse hotline and the automated abuse information system for the purposes of licensure or approval of nursing homes, residential facilities for the developmentally disabled, and home care facilities :

- DCF and its authorized agents and contract providers;
- Agency for Persons with Disabilities;
- Agency for Health Care Administration (AHCA);
- Department of Elderly Affairs (DOEA);
- Department of Health (DOH); or
- County agencies.

These proposed changes to s. 415.107, F.S., may allow unfounded allegations of abuse to be used by DCF, APD, AHCA, and Department of Elderly Affairs for employment screening, and by DCF, APD, AHCA, DOEA, DOH, and county agencies for the licensure or approval process of treatment facilities for the developmentally disabled, nursing homes and intermediate, special services, and transitional living facilities, and home care for aging and disabled adults. This appears contrary to last years SB 758 enacted by ch. 2005-173, Laws of Florida, which specifically prohibits the use of information contained in any report of abuse or neglect for the purpose of employment screening or licensure.

#### C. SECTION DIRECTORY:

Section 1 amends s. 415.102(1), F.S., adding abuse committed by a relative or household member to the definition of "abuse"; amends s. 415.102(15), F. S., adding "vulnerable adult" to the definition of "neglect" to include within the definition of neglect the concept of self-neglect.

<sup>15</sup> Section 415.107(3)(a), F.S., provides that access to all records must be granted to Employees or agents of DCF, AHCA, APD or of the Department of Elderly Affairs who are responsible for carrying out protective investigations, ongoing protective services, or licensure or approval of nursing homes, assisted living facilities, adult day care centers, adult family-care homes, home care for the elderly, hospices, or other facilities used for the placement of vulnerable adults.

<sup>16</sup> Section 415.107(3)(h), F.S., provides that access to all records must be granted to any appropriate official of DCF, AHCA, or the Department of Elderly Affairs who is responsible for: (1) The administration or supervision of the programs for the prevention, investigation, or treatment of abuse, neglect, or exploitation of vulnerable adults when carrying out an official function; or (2) Taking appropriate administrative action concerning an employee alleged to have perpetrated abuse, neglect, or exploitation of a vulnerable adult in an institution.



Section 2 amends s. 415.1051(1), F. S., adding "vulnerable adult in need of services" to include, within the department's authority to seek an order authorizing the provision of protective services, those persons determined to have neglected themselves.

Section 3 amends s. 415.107(3)(a), F.S., including the APD among the list of agencies, departments, employees and agents able to access Adult Protective Services records and reports; amends s. 415.107(8), F.S., enabling information collected from the central abuse hotline to be used for employment screening under certain scenarios and allowing DCF and its authorized agents and contract providers, APD, AHCA, DOEA, DOH or county agencies to use such central abuse hotline information as part of the licensure or approval of certain nursing facilities.

Section 4 provides the act is effective upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

DCF anticipates that this bill will have a minimal fiscal impact on the department, which it states can be absorbed within existing departmental resources.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

There is some redundancy of language in the CS, as lines 121-128 and 131-138 both appear to grant DCF, AHCA, APD and DOEA access to information from the central abuse hotline for the purpose of "licensure or approval" of certain nursing facilities.

The second sentence of s. 415.107(8), F.S., should possibly be its own paragraph (9).

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

At its January 11, 2006 meeting, the Committee on Elder & Long-Term Care adopted an amendment to HB 329. The amendment:

- Includes the Agency for Persons with Disabilities to the list of agencies, departments, employees and agents bestowed with access to all Adult Protective Services records for the purpose of carrying out protective investigations, ongoing protective services, or licensure and approval of certain nursing facilities.
- Enables information collected from the central abuse hotline to be used for employment screening in the instances contemplated pursuant to ss. 415.107(3)(a) and (h).
- Allows such information, and information collected from the automated abuse information system to be used by the Department of Children and Family Services and its agents and contract providers, the Agency for Persons with Disabilities, the Agency for Health Care Administration, the Department of Elderly Affairs, the Department of Health and county agencies for licensure and approval of certain nursing facilities.

The Committee favorably reported a Committee Substitute.

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CHAMBER ACTION

The Elder & Long-Term Care Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to adult protective services; amending s. 415.102, F.S.; redefining the terms "abuse" and "neglect"; amending s. 415.1051, F.S.; providing that the Department of Children and Family Services may petition the court for an order authorizing protective services for a vulnerable adult in need of services; amending s. 415.107, F.S.; authorizing the Agency for Persons with Disabilities to have access to certain confidential records relating to abuse, neglect, or exploitation of vulnerable adults; authorizing certain entities to use certain confidential information in the central abuse hotline and the automated abuse information system for certain purposes; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (15) of section 415.102, Florida Statutes, are amended to read:

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24           415.102   Definitions of terms used in ss. 415.101-

25   415.113.--As used in ss. 415.101-415.113, the term:

26           (1)   "Abuse" means any willful act or threatened act by a  
27   relative, caregiver, or household member that causes or is  
28   likely to cause significant impairment to a vulnerable adult's  
29   physical, mental, or emotional health. Abuse includes acts and  
30   omissions.

31           (15)   "Neglect" means the failure or omission on the part  
32   of the caregiver or vulnerable adult to provide the care,  
33   supervision, and services necessary to maintain the physical and  
34   mental health of the vulnerable adult, including, but not  
35   limited to, food, clothing, medicine, shelter, supervision, and  
36   medical services, that a prudent person would consider essential  
37   for the well-being of a vulnerable adult. The term "neglect"  
38   also means the failure of a caregiver or vulnerable adult to  
39   make a reasonable effort to protect a vulnerable adult from  
40   abuse, neglect, or exploitation by others. "Neglect" is repeated  
41   conduct or a single incident of carelessness which produces or  
42   could reasonably be expected to result in serious physical or  
43   psychological injury or a substantial risk of death.

44           Section 2.   Subsection (1) of section 415.1051, Florida  
45   Statutes, is amended to read:

46           415.1051   Protective services interventions when capacity  
47   to consent is lacking; nonemergencies; emergencies; orders;  
48   limitations.--

49           (1)   NONEMERGENCY PROTECTIVE SERVICES INTERVENTIONS.--If  
50   the department has reasonable cause to believe that a vulnerable  
51   adult or a vulnerable adult in need of services is being abused,

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neglected, or exploited and is in need of protective services but lacks the capacity to consent to protective services, the department shall petition the court for an order authorizing the provision of protective services.

(a) Nonemergency protective services petition.--The petition must state the name, age, and address of the vulnerable adult, allege specific facts sufficient to show that the vulnerable adult is in need of protective services and lacks the capacity to consent to them, and indicate the services needed.

(b) Notice.--Notice of the filing of the petition and a copy of the petition must be given to the vulnerable adult, to that person's spouse, guardian, and legal counsel, and, when known, to the adult children or next of kin of the vulnerable adult. Such notice must be given at least 5 days before the hearing.

(c) Hearing.--

1. The court shall set the case for hearing within 14 days after the filing of the petition. The vulnerable adult and any person given notice of the filing of the petition have the right to be present at the hearing. The department must make reasonable efforts to ensure the presence of the vulnerable adult at the hearing.

2. The vulnerable adult has the right to be represented by legal counsel at the hearing. The court shall appoint legal counsel to represent a vulnerable adult who is without legal representation.

3. The court shall determine whether:

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79           a. Protective services, including in-home services, are  
80 necessary.

81           b. The vulnerable adult lacks the capacity to consent to  
82 the provision of such services.

83           (d) Hearing findings.--If at the hearing the court finds  
84 by clear and convincing evidence that the vulnerable adult is in  
85 need of protective services and lacks the capacity to consent,  
86 the court may issue an order authorizing the provision of  
87 protective services. If an order for protective services is  
88 issued, it must include a statement of the services to be  
89 provided and designate an individual or agency to be responsible  
90 for performing or obtaining the essential services on behalf of  
91 the vulnerable adult or otherwise consenting to protective  
92 services on behalf of the vulnerable adult.

93           (e) Continued protective services.--

94           1. No more than 60 days after the date of the order  
95 authorizing the provision of protective services, the department  
96 shall petition the court to determine whether:

97           a. Protective services will be continued with the consent  
98 of the vulnerable adult pursuant to subsection (1);

99           b. Protective services will be continued for the  
100 vulnerable adult who lacks capacity;

101           c. Protective services will be discontinued; or

102           d. A petition for guardianship should be filed pursuant to  
103 chapter 744.

104           2. If the court determines that a petition for  
105 guardianship should be filed pursuant to chapter 744, the court,

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for good cause shown, may order continued protective services until it makes a determination regarding capacity.

(f) Costs.--The costs of services ordered under this section must be paid by the perpetrator if the perpetrator is financially able to do so; or by third-party reimbursement, if available. If the vulnerable adult is unable to pay for guardianship, application may be made to the public guardian for public guardianship services, if available.

Section 3. Paragraph (a) of subsection (3) and subsection (8) of section 415.107, Florida Statutes, are amended to read:

415.107 Confidentiality of reports and records.--

(3) Access to all records, excluding the name of the reporter which shall be released only as provided in subsection (6), shall be granted only to the following persons, officials, and agencies:

(a) Employees or agents of the department, ~~of~~ the Agency for Health Care Administration, the Agency for Persons with Disabilities, or ~~of~~ the Department of Elderly Affairs who are responsible for carrying out protective investigations, ongoing protective services, or licensure or approval of nursing homes, assisted living facilities, adult day care centers, adult family-care homes, home care for the elderly, hospices, or other facilities used for the placement of vulnerable adults.

(8) Information in the central abuse hotline may not be used for employment screening, except as provided in paragraphs (3)(a) and (h). Information in the central abuse hotline and the department's automated abuse information system may be used by the department, the department's authorized agents or contract

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134 providers, the Agency for Persons with Disabilities, the Agency  
135 for Health Care Administration, the Department of Elderly  
136 Affairs, the Department of Health, or county agencies as a part  
137 of the licensure or approval process pursuant to ss. 393.067-  
138 393.0678, parts II-VIII of chapter 400, and ss. 410.031-410.037.

139       Section 4. This act shall take effect upon becoming a law.



HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 329 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

**1**

Council/Committee hearing bill: Civil Justice Committee  
Representative(s) Cannon offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Subsections (1) and (15) of section 415.102,  
Florida Statutes, are amended to read:

415.102 Definitions of terms used in ss. 415.101-415.113.-  
-As used in ss. 415.101-415.113, the term:

(1) "Abuse" means any willful act or threatened act by a  
relative, caregiver, or household member which ~~that~~ causes or is  
likely to cause significant impairment to a vulnerable adult's  
physical, mental, or emotional health. Abuse includes acts and  
omissions.

(15) "Neglect" means the failure or omission on the part  
of the caregiver or vulnerable adult to provide the care,  
supervision, and services necessary to maintain the physical and  
mental health of the vulnerable adult, including, but not  
limited to, food, clothing, medicine, shelter, supervision, and  
medical services, which ~~that~~ a prudent person would consider  
essential for the well-being of a vulnerable adult. The term  
"neglect" also means the failure of a caregiver or vulnerable

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

23 adult to make a reasonable effort to protect a vulnerable adult  
24 from abuse, neglect, or exploitation by others. "Neglect" is  
25 repeated conduct or a single incident of carelessness which  
26 produces or could reasonably be expected to result in serious  
27 physical or psychological injury or a substantial risk of death.

28 Section 2. Subsection (1) of section 415.1051, Florida  
29 Statutes, is amended to read:

30 415.1051 Protective services interventions when capacity  
31 to consent is lacking; nonemergencies; emergencies; orders;  
32 limitations.--

33 (1) NONEMERGENCY PROTECTIVE SERVICES INTERVENTIONS.--If  
34 the department has reasonable cause to believe that a vulnerable  
35 adult or a vulnerable adult in need of services is being abused,  
36 neglected, or exploited and is in need of protective services  
37 but lacks the capacity to consent to protective services, the  
38 department shall petition the court for an order authorizing the  
39 provision of protective services.

40 (a) Nonemergency protective services petition.--The  
41 petition must state the name, age, and address of the vulnerable  
42 adult, allege specific facts sufficient to show that the  
43 vulnerable adult is in need of protective services and lacks the  
44 capacity to consent to them, and indicate the services needed.

45 (b) Notice.--Notice of the filing of the petition and a  
46 copy of the petition must be given to the vulnerable adult, to  
47 that person's spouse, guardian, and legal counsel, and, when  
48 known, to the adult children or next of kin of the vulnerable  
49 adult. Such notice must be given at least 5 days before the  
50 hearing.

51 (c) Hearing.--

52 1. The court shall set the case for hearing within 14 days  
53 after the filing of the petition. The vulnerable adult and any

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54 person given notice of the filing of the petition have the right  
55 to be present at the hearing. The department must make  
56 reasonable efforts to ensure the presence of the vulnerable  
57 adult at the hearing.

58 2. The vulnerable adult has the right to be represented by  
59 legal counsel at the hearing. The court shall appoint legal  
60 counsel to represent a vulnerable adult who is without legal  
61 representation.

62 3. The court shall determine whether:

63 a. Protective services, including in-home services, are  
64 necessary.

65 b. The vulnerable adult lacks the capacity to consent to  
66 the provision of such services.

67 (d) Hearing findings.--If at the hearing the court finds  
68 by clear and convincing evidence that the vulnerable adult is in  
69 need of protective services and lacks the capacity to consent,  
70 the court may issue an order authorizing the provision of  
71 protective services. If an order for protective services is  
72 issued, it must include a statement of the services to be  
73 provided and designate an individual or agency to be responsible  
74 for performing or obtaining the essential services on behalf of  
75 the vulnerable adult or otherwise consenting to protective  
76 services on behalf of the vulnerable adult.

77 (e) Continued protective services.--

78 1. No more than 60 days after the date of the order  
79 authorizing the provision of protective services, the department  
80 shall petition the court to determine whether:

81 a. Protective services will be continued with the consent  
82 of the vulnerable adult pursuant to subsection (1);

83 b. Protective services will be continued for the  
84 vulnerable adult who lacks capacity;

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c. Protective services will be discontinued; or

d. A petition for guardianship should be filed pursuant to chapter 744.

2. If the court determines that a petition for guardianship should be filed pursuant to chapter 744, the court, for good cause shown, may order continued protective services until it makes a determination regarding capacity.

(f) Costs.--The costs of services ordered under this section must be paid by the perpetrator if the perpetrator is financially able to do so; or by third-party reimbursement, if available. If the vulnerable adult is unable to pay for guardianship, application may be made to the public guardian for public guardianship services, if available.

Section 3. Paragraphs (a) and (h) of subsection (3) of section 415.107, Florida Statutes, are amended to read:

415.107 Confidentiality of reports and records.--

(3) Access to all records, excluding the name of the reporter which shall be released only as provided in subsection (6), shall be granted only to the following persons, officials, and agencies:

(a) Employees or agents of the department, ~~of~~ the Agency for Health Care Administration, the Agency for Persons with Disabilities, or ~~of~~ the Department of Elderly Affairs who are responsible for carrying out protective investigations, ongoing protective services, or licensure or approval of nursing homes, assisted living facilities, adult day care centers, adult family-care homes, home care for the elderly, hospices, or other facilities used for the placement of vulnerable adults.

(h) Any appropriate official of the department, ~~of~~ the Agency for Health Care Administration, the Agency for Persons

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115 with Disabilities, or ~~of~~ the Department of Elderly Affairs who  
116 is responsible for:

117 1. Administration or supervision of the programs for the  
118 prevention, investigation, or treatment of abuse, neglect, or  
119 exploitation of vulnerable adults when carrying out an official  
120 function; or

121 2. Taking appropriate administrative action concerning an  
122 employee alleged to have perpetrated abuse, neglect, or  
123 exploitation of a vulnerable adult in an institution.

124 Section 4. This act shall take effect upon becoming a law.  
125

126 ===== T I T L E A M E N D M E N T =====

127 Remove the entire title and insert:

128 An act relating to adult protective services; amending s.  
129 415.102, F.S.; redefining the term "abuse" to include actions by  
130 a relative or a household member which are likely to harm a  
131 vulnerable adult; redefining the term "neglect" to include  
132 actions of a vulnerable adult against himself or herself;  
133 amending s. 415.1051, F.S.; providing for the Department of  
134 Children and Family Services to petition the court for an order  
135 authorizing the provision of protective services for a  
136 vulnerable adult in need of services; amending s. 415.107, F.S.;  
137 authorizing the Agency for Persons with Disabilities to have  
138 access to certain otherwise confidential records and reports;  
139 providing an effective date.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 519

Internet Screening in Public Libraries

**SPONSOR(S):** Kravitz

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 960

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Transportation & Economic Development Appropriations Committee			
3) Justice Council			
4)			
5)			

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### SUMMARY ANALYSIS

This bill addresses the access by adults and children to internet pornography in public libraries. The bill requires public libraries to adopt an internet safety policy and install technology protection measures on all public computers. The protection measures are to prevent adults from using the libraries computers to access child pornography or obscene visual depictions, and to prevent minors from accessing child pornography and visual depictions that are obscene or harmful to minors. The protection measures can be disabled upon an adult's request to use the computer for bona fide research or other lawful purposes. Libraries are precluded from maintaining a record of the adults who request this disablement.

The bill authorizes the Division of Library and Information Services to adopt rules requiring the head of each administrative unit to give an annual written statement, under penalty of perjury, that all public library locations within the unit are in compliance with this section, as a condition of receiving state funds. The bill provides that a civil cause of action may arise in favor of any state resident for a library's non-compliance with the requirements of the bill. A \$100 dollar a day fine may be imposed upon the administrative unit governing the library for each day the library fails to comply with this bill.

This bill appears to have a minimal negative fiscal impact on local governments. This bill does not appear to have a fiscal impact on state government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional responsibilities for public libraries and their administrative units. The bill establishes rule-making authority in the Department of State, Division of Library and Information Services.

Empower Families -- This bill seeks to benefit families by decreasing the possibility of children and adults being exposed to pornography at public libraries.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

##### Federal Law

In 2000, Congress enacted the Children's Internet Protection Act ("CIPA"), which requires public libraries participating in certain internet technology programs to certify that they are using computer filtering software to prevent the on-screen depiction of obscenity, child pornography, or other material harmful to minors.<sup>1</sup> The Supreme Court upheld CIPA in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), determining the law did not violate the First Amendment's free speech clause nor did it impose an unconstitutional condition on public libraries. CIPA does not impose any penalties on libraries that choose not to install filtering software; however, libraries that choose to offer unfiltered internet access will not receive federal funding for acquiring educational internet resources.<sup>2</sup>

##### State Law

Currently, state law does not contain any requirements that public libraries place internet filters on the public computers. Nevertheless, there are a number of statutes that prohibit the display of obscene materials to minors and child pornography.

"Obscenity" is defined in s. 847.001(10), F.S., as:

the status of material which:

- (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

This definition of obscenity is taken directly from the Supreme Court's definition in *Miller v. California*, 413 U.S. 15 (1973).<sup>3</sup>

"Harmful to minors" is defined in s. 847.001(6), F.S., as:

<sup>1</sup> National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, Feb. 17, 2005.

<sup>2</sup> *U.S. v. Am. Libraries Ass'n*, 539 U.S. 194, 212 (2003)(plurality opinion).

<sup>3</sup> *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).



any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interests of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Section 847.0133, F.S., prohibits any person from knowingly selling, renting, loaning, giving away, distributing, transmitting, or showing any obscene material to a minor.<sup>4,5</sup> Section 847.0137, F.S., prohibits the transmission of any image, data, or information, constituting child pornography through the internet or any other medium. Section 847.0138, F.S. prohibits the transmission of material harmful to minors to a minor by means of electronic device or equipment. Section 847.0139, F.S., provides immunity from civil liability for anyone reporting to a law enforcement officer what the person reasonably believes to be child pornography or the transmission to a minor of child pornography or any information, image, or data that is harmful to minors. Section 847.03, F.S., requires any officer arresting a person charged with an offense under s. 847.011, F.S., relating to acts relating to lewd or obscene materials, to seize such materials at the time of the arrest.

#### Current Library Internet Policies

The Department of State, Division of Library and Information Services, conducted a survey of Florida's public libraries to ascertain their internet use policies and filtering practices.<sup>6</sup> Out of 149 county and municipal libraries in Florida's 67 counties, 139 libraries responded to the survey. All of the libraries who answered the survey had locally adopted internet use policies, and 138 of the libraries prohibited the display of obscene or offensive images.<sup>7</sup> Of the libraries responding to the survey, 110 currently had filtering software or technology on their computers, and twenty-three did not filter.<sup>8</sup> Fourteen counties have one or more libraries that do not have filters, another four libraries only filter computers in the children's or youth section of the library, and three of the counties that did not have filters indicated that they would be installing filters soon or were in the process of negotiating with vendors.<sup>9</sup>

Three libraries reported that they were not CIPA compliant, twenty-nine libraries stated that CIPA did not apply to them, and the other 107 libraries indicated that they were CIPA compliant.<sup>10</sup>

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<sup>4</sup> Obscene materials means "any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose." Section 847.0133, F.S.

<sup>5</sup> The term "obscene" has the same meaning in s. 847.0133, F.S. as it has in s. 847.001, F.S.

<sup>6</sup> Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 21, 2005 (hereinafter "*Internet Policies*").

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## Effect of Bill

### Definitions

The bill creates a new section, s. 257.44, F.S., requiring internet screening in public libraries. A number of terms that are crucial to an understanding of the requirements and prohibitions provided for in the bill are detailed below. The bill defines "public library" as "any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof."<sup>11</sup> Excluded from this definition are libraries open to the public that are maintained or established by a community college or state university. A "public computer" is any computer made available to the public and that has internet access.<sup>12</sup>

This bill requires a public library to enforce an internet safety policy providing for:

- Installation and operation of a protection measure on all public computers in the library that restricts access by adults to visual depictions that are obscene or constitute child pornography and that restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors, and
- Disablement of the protection measure when an adult requests to use the computer for bona fide research or other lawful purpose.

A "technology protection measure" is software or equivalent technology that blocks or filters internet access to the visual depictions that are obscene, contain child pornography, or that are harmful to minors.<sup>13</sup>

The definition of child pornography is the same definition that appears in s. 847.001, F.S. For the purposes of this bill, harmful to minors is defined as:

[A]ny picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>14</sup>

"Obscene" is defined as it is currently in s. 847.001, F.S.<sup>15</sup> "Administrative unit" is defined as "the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body."<sup>16</sup>

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<sup>11</sup> Section 257.44(1)(g).

<sup>12</sup> Section 257.44(1)(f).

<sup>13</sup> Section 257.44(1)(i).

<sup>14</sup> Section 257.44(1)(c).

<sup>15</sup> Section 257.44(1)(e).

<sup>16</sup> Section 257.44(1)(a).

## Internet Policy

Each public library is required to post a conspicuous notice informing library patrons of the internet safety policy and indicating that the policy is available for review.<sup>17</sup> Libraries must disable the protection measure upon the request of any adult who wishes to use the computer for bona fide research or other lawful purpose,<sup>18</sup> and the library may not maintain a record containing the names of any adult who has requested the protection measure be disabled.<sup>19</sup>

## Civil Action

Should a public library knowingly fail to make reasonable efforts to comply with the requirements of the bill, any state resident may seek to enforce the requirements of the bill by filing a civil action.<sup>20</sup> Reasonable efforts are defined as the public library, in implementing the policy required by this bill, in its ordinary course of business: posts its internet safety policy; uses a technology protection measure on all public computers; and disables the protection measure when an adult has requested to use the computer for bona fide research or other lawful purpose.<sup>21</sup>

Before initiating a civil action and within 45 days after the public library's alleged failure to make reasonable efforts to comply with the requirements of this bill, a resident is required to mail a written notice of intent to file a civil action to the head of the applicable administrative unit.<sup>22</sup> The notice must identify each public library location involved and specify the facts and circumstances alleged to constitute a violation.<sup>23</sup> Within 45 days of receipt of this notice, the administrative unit may mail a written response to the resident who provided the notice.<sup>24</sup> The written response must specify the efforts each public library location identified in the notice is making to comply with the requirements of this bill.<sup>25</sup>

If the resident does not receive a written response within 60 days after receipt of the notice by the head of the administrative unit or if the written response fails to indicate that the public library is making reasonable efforts to comply with the bill, the resident may institute a civil action to seek injunctive relief to enforce the provisions of the bill in the circuit court in the county in which the administrative unit is located.<sup>26</sup>

A court may impose a fine on the administrative unit in the amount of \$100 dollars per day per public library location that is found to have not made reasonable efforts to comply with the bill,<sup>27</sup> and order the administrative unit that is fined to pay reasonable attorney's fees and costs to the prevailing resident.<sup>28</sup> Should the court determine the civil action was filed in bad faith or was frivolous, the court may order the resident to pay reasonable attorney's fees and costs to the administrative unit.<sup>29</sup> Except as provided above, the bill does not authorize a cause of action in favor of any person due to a public library's failure to comply.<sup>30</sup>

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<sup>17</sup> Section 257.44(2)(b).

<sup>18</sup> Section 257.44(2)(a)(2).

<sup>19</sup> Section 257.44(2)(c).

<sup>20</sup> Section 257.44(3).

<sup>21</sup> Section 257.44(1)(h).

<sup>22</sup> Section 257.44(3)(a).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* All of the mailings mentioned above must be certified with return receipt requested.

<sup>26</sup> Section 257.44(3)(b).

<sup>27</sup> The fine accrues from the date that the head of the administrative unit received the notice of intended civil action until the date upon which the public library location begins making reasonable efforts to comply. Section 257.44(3)(c)(1), F.S.

<sup>28</sup> Section 257.44(3)(c)(1)-(2).

<sup>29</sup> Section 257.44(3)(c)(2).

<sup>30</sup> Section 257.44(5).

The Clerk of the Circuit Court is to act as the depository for all paid civil fines based upon this bill.<sup>31</sup> The Clerk is authorized to retain a service charge of one (\$1) dollar for each payment and the Clerk is directed to, on a monthly basis, transfer the fines collected to the Department of Revenue for deposit in the Records Management Trust Fund.<sup>32</sup>

#### Rule-Making Authority

The Division of Library and Information Services must adopt administrative rules requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all libraries within the administrative unit are in compliance with the internet safety policy as a condition of the receipt of any state funds being distributed under ch. 257, F.S.<sup>33</sup>

#### C. SECTION DIRECTORY:

Section 1 creates s. 257.44, F.S., requiring internet screening in public libraries.

Section 2 provides a legislative finding that the installation and operation of technology protection measures in public libraries to protect against adult access to obscene visual depictions or child pornography, or access by minors to obscene visual depictions, child pornography, or images that are harmful to minors, fulfills an important state interest.

Section 3 provides an effective date of October 1, 2006.

### **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The fiscal analysis provided by the Department of State states that there is no fiscal impact to the Department. However, this bill would appear to have a minimal but unknown fiscal impact on state government. The Department of State is required to promulgate rules concerning annual compliance by libraries, and the Department is required to collect and maintain those annual attestations.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

The Department of State estimates that this bill will require recurring expenditures of \$108,240 annually for libraries not currently using filtering software. The department estimates that the total recurring cost to all libraries regulated by this bill for filtering software is \$666,600.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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<sup>31</sup> Section 257.44(3)(d).

<sup>32</sup> *Id.*

<sup>33</sup> Section 257.44(4).

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Article VII, s. 18(a), Florida Constitution, provides that no county or municipality can be required to take an action requiring the expenditure of funds unless certain conditions are met. It can be argued that this bill requires counties and municipalities to spend funds to purchase filtering software. However, if a bill does not have a significant fiscal impact, then it is exempt from the mandate provision.<sup>34</sup> The current policy of the House and Senate Appropriations Committees is that if a bill requires an aggregate expenditure of more than \$0.10 per resident, or \$1.8 million, then the bill has a significant economic impact. Based upon the survey of Florida's public libraries and the fiscal analysis from the Department of State it appears that this bill will not impose a significant economic impact on counties and municipalities, and thus does not require an extraordinary vote as a mandate.

2. Other:

Access by Minors

This bill may raise First Amendment concerns since the statute creates a new definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), F.S., which is similar to the Supreme Court's definition of obscenity. Although obscenity is not a protected category of speech, "[s]exual expression which is indecent but not obscene is protected by the First Amendment."<sup>35</sup> In other words, obscene material is unprotected by the Constitution but indecent material is constitutionally protected. Hence, the new definition should be reviewed to determine whether it would infringe upon Constitutional protected speech.

For the purposes of this bill, harmful to minors is defined as:

[A]ny picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>36</sup>

This "harmful to minors" standard is a content-based regulation of speech<sup>37</sup>, which must be narrowly tailored to promote a compelling government interest.<sup>38</sup> However, internet access in a public library is

<sup>34</sup> Art. VII, s. 18(a), FLA. CONST.

<sup>35</sup> *Simmons v. State*, 886 So. 2d 399, 492-03 (Fla. 1st DCA 2004) (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>36</sup> Section 257.44(1)(c).

<sup>37</sup> According to 16A Am. Jur. 2d, Constitutional Law s. 460:

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DATE: 1/31/2006

not a traditional or designated public forum,<sup>39</sup> and a library "does not acquire internet terminals in order to create a public forum for Web publishers to express themselves."<sup>40</sup>

The protection of children from harmful material is a compelling state interest, as "common sense dictates that a minor's rights are not absolute," and the legislature has the right to protect minors from the conduct of others.<sup>41</sup> The legislature has the responsibility and authority to protect all of the children in the state, and the state "has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual."<sup>42</sup>

"A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the internet than when it collects material from any other source."<sup>43</sup> Thus, internet access in public libraries is not afforded the broadest level of free speech protection, and the government is free to regulate the content of speech and to determine which topics are appropriate for discussion, although to the extent that internet access might be considered a limited public forum, it is treated as a public forum for its topics of discussion.<sup>44</sup> A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.<sup>45</sup>

"The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected)."<sup>46</sup>

The Supreme Court has "repeatedly" recognized that the government has an interest in protecting children from harmful materials.<sup>47</sup> As with CIPA, any internet materials that are suitable for adults but

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[t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue. . . . Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.

<sup>38</sup> *Simmons v. State*, 886 So. 2d at 403 (internal citations omitted).

<sup>39</sup> Whether or not a place is designated a traditional or designated public form can be significant. The following quotation from 16A Am. Jur. 2d, Constitutional Law, s. 518 is particularly enlightening:

Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker's activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government's ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

<sup>40</sup> *Am. Library Ass'n*, 539 U.S. at 205-06.

<sup>41</sup> *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995)(citing *In re T.W.*, 551 So.2d 1186 (Fla.1989).

<sup>42</sup> *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).

<sup>43</sup> *Am. Library Ass'n*, 539 U.S. at 208.

<sup>44</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

<sup>45</sup> *Id.* at 46.

<sup>46</sup> *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

<sup>47</sup> *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Morris v. State*, 789 So. 2d 1032, 1036 (Fla. 1st DCA 2001)).

not for children may be accessed by an adult simply by asking a librarian to unblock or disable the filter provided that the adult desires to access the material for "bona fide research or other lawful purposes."<sup>48</sup>

### Access by Adults

The constitutional standards regarding adult access to indecent materials are different from those applicable to minors. It is possible that a court might find that an adult's constitutional right to access such material is hindered by the inherent time delay required to stop the filtering software for the adult patrons benefit. There is no definitive line for determining when an extended delay in granting an adult's request to unblock the software might be considered an unreasonable infringement upon an adult's right to conduct bona fide research and pursue other lawful uses of the internet. For as Justice Kennedy opined in his concurrence in the plurality opinion in *Am. Library Ass'n*:

If, on the request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.

\*\*\*\*

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.

\*\*\*\*

There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.<sup>49</sup>

### B. RULE-MAKING AUTHORITY:

This bill requires the Department of State, Division of Library and Information Services, to adopt rules pursuant to s. 120.536(1), F.S., and s. 120.54, F.S., requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the administrative unit are in compliance with s. 257.44(2), which requires each public library to enforce an internet safety policy.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

#### Filtering Difficulties

The following is an enlightening quote from Justice Stevens' dissent in *Am. Library Ass'n*,

Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is

<sup>48</sup> *Am. Library Ass'n*, 539 U.S. at 209.

<sup>49</sup> *Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize this Playboy name in that logo.<sup>50</sup>

#### Harmful to Minors

Section 847.001(6), F.S. provides a definition for "harmful to minors." The instant bill seeks to establish a new definition for "harmful to minors" for the purposes of this bill. It is unclear why a different definition of "harmful to minors" is included in the bill.

#### Visual Depictions

Section 257.44(1)(i), F.S. defines technology protection measure as "software or equivalent technology that blocks or filters internet access to the visual depiction that are proscribed under subsection (2) [the internet safety policy]". This definition would seem not to include audio depictions. The CIPA provides additional protection against other materials that may be prohibited by providing: "(2) Access to other materials[:]. Nothing in this subsection shall be construed to prohibit a library from limiting internet access to or otherwise protecting against materials other than those referenced in subclauses (I), (II), and (III) of paragraph (1)(A)(i) [items that are obscene, child pornography, or harmful to minors]" 20 U.S.C. s. 9134.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

n/a

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<sup>50</sup> *Am. Library Ass'n*, 539 U.S. at 221 (Stevens, J., dissenting).



HB 519

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A bill to be entitled

An act relating to Internet screening in public libraries; creating s. 257.44, F.S.; defining terms; requiring public libraries to provide technology that protects against Internet access to specified proscribed visual depictions; allowing adults to request disablement of the technology for specified purposes; prohibiting a public library from maintaining a record of adults who request such disablement; requiring a public library to post notice of its Internet safety policy; providing for the assessment of a fine and attorney's fees and costs in connection with a violation by a public library; directing the Division of Library and Information Services within the Department of State to adopt rules requiring a written attestation of compliance as a condition of state funding; providing a cause of action is not authorized for a violation by a public library except as provided under the act; providing a finding of important state interest; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 257.44, Florida Statutes, is created to read:

257.44 Internet screening in public libraries.--

(1) As used in this section, the term:

(a) "Administrative unit" means the entity designated by a local government body as responsible for administering all

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public libraries established or maintained by that local government body.

(b) "Child pornography" has the same meaning as in s. 847.001.

(c) "Harmful to minors" means any picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and

3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(d) "Minor" means an individual who is younger than 18 years of age.

(e) "Obscene" has the same meaning as in s. 847.001.

(f) "Public computer" means a computer that is made available to the public and that has Internet access.

(g) "Public library" means any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof. The term does not include a library that is open to the public and that is established or maintained by a community college or state university.

(h) "Reasonable efforts" means the public library, in

57 implementing the policy required by subsection (2), in its  
58 ordinary course of business:

59 1. Posts its Internet safety policy;

60 2. Uses a technology protection measure on all public  
61 computers; and

62 3. Disables the technology protection measure upon an  
63 adult's request to use the computer for bona fide research or  
64 other lawful purpose.

65 (i) "Technology protection measure" means software or  
66 equivalent technology that blocks or filters Internet access to  
67 the visual depictions that are proscribed under subsection (2).

68 (2)(a) Each public library shall enforce an Internet  
69 safety policy that provides for:

70 1. Installation and operation of a technology protection  
71 measure on all public computers in the public library which  
72 protects against access through such computers by adults to  
73 visual depictions that are obscene or constitute child  
74 pornography and by minors to visual depictions that are obscene,  
75 constitute child pornography, or are harmful to minors; and

76 2. Disablement of the technology protection measure by an  
77 employee of the public library upon an adult's request to use  
78 the computer for bona fide research or other lawful purpose.

79 (b) Each public library shall post a notice in a  
80 conspicuous area of the public library which indicates that an  
81 Internet safety policy has been adopted and informs the public  
82 that the Internet safety policy is available for review at each  
83 public library.

84 (c) A public library may not maintain a record of names of

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85 adults who request that the technology protection measure be  
86 disabled under this subsection.

87 (3) If a public library knowingly fails to make reasonable  
88 efforts to comply with subsection (2), a resident of this state  
89 may seek enforcement as provided in this subsection.

90 (a) Before instituting a civil action under paragraph (b),  
91 the resident shall, within 45 days after a public library's  
92 alleged failure to make such reasonable efforts, mail a written  
93 notice of intended civil action for enforcement to the head of  
94 the applicable administrative unit. The notice must identify  
95 each public library location involved and specify the facts and  
96 circumstances alleged to constitute a violation of subsection  
97 (2). Within 45 days after the receipt of such notice, the  
98 administrative unit shall mail a written response to the  
99 resident who provided the notice. The written response must  
100 specify the efforts, if any, which each public library location  
101 identified in the notice is making to comply with the  
102 requirements of subsection (2). All mailings required by this  
103 paragraph must be certified with return receipt requested.

104 (b) If the resident does not receive the written response  
105 required in paragraph (a) within 60 days after receipt of the  
106 notice by the head of the administrative unit or if the written  
107 response fails to indicate that the public library is making  
108 reasonable efforts to comply with subsection (2), the resident  
109 may institute a civil action in the circuit court of the county  
110 in which the administrative unit is located to seek injunctive  
111 relief to enforce compliance with subsection (2).

112 (c) In connection with an enforcement action under

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113 paragraph (b), the court shall:

114 1. Impose a civil fine upon the administrative unit in the  
115 amount of \$100 per day per public library location that is found  
116 to have not made reasonable efforts to comply with subsection  
117 (2). Accrual of the fine shall be for the period between the  
118 date that the head of the administrative unit received the  
119 notice of intended civil action for enforcement and the date  
120 upon which the public library location begins making reasonable  
121 efforts to comply with subsection (2).

122 2. Order an administrative unit that is fined pursuant to  
123 subparagraph 1. to pay reasonable attorney's fees and costs to a  
124 prevailing resident. If the court finds that the civil action  
125 was in bad faith or frivolous, it shall order the resident who  
126 filed the action to pay reasonable attorney's fees and costs to  
127 the administrative unit.

128 (d) The clerk of the circuit court shall act as the  
129 depository for all civil fines paid pursuant to this subsection.  
130 The clerk may retain a service charge of \$1 for each such  
131 payment and shall, on a monthly basis, transfer the moneys  
132 collected for such fines to the Department of Revenue for  
133 deposit in the Records Management Trust Fund within the  
134 Department of State.

135 (4) The Division of Library and Information Services  
136 within the Department of State shall adopt rules pursuant to ss.  
137 120.536(1) and 120.54 which require the head of each  
138 administrative unit to annually attest in writing, under penalty  
139 of perjury, that all public library locations for which the  
140 administrative unit is responsible are in compliance with

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141 subsection (2) as a condition of the receipt of any state funds  
142 distributed under this chapter.

143 (5) Except as authorized in subsection (3), this section  
144 does not authorize a cause of action in favor of any person due  
145 to a public library's failure to comply with subsection (2).

146 Section 2. In accordance with s. 18, Art. VII of the State  
147 Constitution, the Legislature finds that the installation and  
148 operation by public libraries of technology protection measures  
149 that protect against access by adults to visual depictions that  
150 are obscene or constitute child pornography and by minors to  
151 visual depictions that are obscene, constitute child  
152 pornography, or are harmful to minors fulfills an important  
153 state interest.

154 Section 3. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. HB 519

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1

Council/Committee hearing bill: Civil Justice Committee  
Representative Kravitz offered the following:

**Amendment (with title amendments)**

Remove line(s) 87-143, and insert:

(3) The Division of Library and Information Services  
within the Department of State shall adopt rules pursuant to ss.  
120.536(1) and 120.54 which require the head of each  
administrative unit to annually attest in writing, under penalty  
of perjury, that all public library locations for which the  
administrative unit is responsible are in compliance with  
subsection (2) as a condition of the receipt of any state funds  
distributed under this chapter.

(4) This section

===== T I T L E A M E N D M E N T =====

Remove line(s) 10-17 and insert:  
its Internet safety policy; directing the Division of Library  
and Information Services within the Department of State to adopt  
rules requiring a written attestation of compliance as a  
condition of state funding; providing a cause of action is not  
authorized for a violation by a public library; providing





## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 567 Notaries Public  
**SPONSOR(S):** Kyle; Rivera; Sansom  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Governmental Operations Committee			
3) Transportation & Economic Development Appropriations Committee			
4) Justice Council			
5)			

## SUMMARY ANALYSIS

A notary public is an appointed public officer, commissioned by the Governor, whose function is to: administer oaths; take acknowledgments of deeds and other instruments; attest to or certify photocopies of certain documents; and perform other duties.

The bill requires notaries public to maintain a journal of notarial acts which is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer.

This bill also authorizes a notary public to charge \$10 dollars for each signature notarized, rather than per document. However, the bill prohibits notaries public from charging fees for services to a U.S. military veteran, firefighter, or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

**This bill does not appear to have a fiscal impact on state or local governments.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- this bill increases the regulation of notaries public.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

A notary public (hereinafter "notary" or "notaries") is a "public officer appointed and commissioned by the Governor whose function is to administer oaths; to take acknowledgments of deeds and other instruments; to attest to or certify photocopies of certain documents; and to perform other duties specified by law."<sup>1</sup>

Chapter 117, F.S.,<sup>2</sup> provides for notaries and directs that the Governor is authorized to appoint as many notaries as necessary.<sup>3</sup> A notary must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write, and understand English.

Once appointed, a notary serves a four-year term.<sup>4</sup> During the term of office, a notary must post and maintain a \$7,500 bond that is to be payable to any individual harmed as a result of a notaries breach of duty.<sup>5</sup> The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida.<sup>6</sup> If a surety pays an individual harmed by the notary for breach of duty, the company must notify the Governor of the payment and the underlying circumstances.<sup>7</sup>

##### Duties of a Notary

Duties of a notary can be found primarily in ch. 117, F.S., although other statutory provisions implicate the duties of a notary public.<sup>8</sup> Essentially, a notary is approved to perform six functions: administer oaths or affirmations;<sup>9</sup> take acknowledgements;<sup>10</sup> attest to photocopies of certain documents;<sup>11</sup> solemnize marriage;<sup>12</sup> verify vehicle identification numbers;<sup>13</sup> and certify contents of a safe-deposit

<sup>1</sup> *Governor's Reference Manual for Notaries*, State of Florida, November 2001 ed., pg. 6 (hereinafter "*Reference Manual*").

<sup>2</sup> See 1 Fla. Jur 2d Acknowledgments s. 42 (stating, [b]ecause a notary public is generally held to be a public officer, the eligibility of a person to be a notary public is largely regulated by statutory provisions (citing *Smith v. McEwen*, 161 So. 68 (1935) (notaries public are recognized officers of Florida)).

<sup>3</sup> Section 117.01(1), F.S.

<sup>4</sup> Section 117.01(1), F.S.

<sup>5</sup> Section 117.01(7)(a), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> Section 117.01(8), F.S.

<sup>8</sup> 4 See, e.g., ss. 116.35, 116.36, 116.37, 116.38, and 320.04 (government employees as notaries public); 92.50, 92.52, 695.03, and 92.525 (oaths); 92.51 and 695.031 (administration of oaths by armed forces officers); 695.25 (notarial certificates relating to real property); 741.07 and 741.08 (solemnization of marriages); 319.23 (verification of VIN); 655.94 (certification of safe-deposit box content); 668.50 (electronic notarization); 943.10 and 316.640 (oaths by law enforcement officers); 732.503 (notarizing a self-proof will); 425.26 (notary services for rural electric cooperatives); 695.26 (recording requirements); 838.022 (official misconduct); 831.01 and 831.02 (forgery); 775.082 and 775.083 (penalties under the law); 454.23 (penalties for unauthorized practice of law); 721.96, 721.97, and 721.98, F.S. (timeshare commissioner of deeds). List extracted from *Reference Manual*.

<sup>9</sup> Section 117.03, F.S.

<sup>10</sup> Section 117.04, F.S.

<sup>11</sup> Section 117.05(12)(a), F.S.

<sup>12</sup> Section 117.045, F.S.

<sup>13</sup> Section 319.23(3)(a)(2), F.S.

box.<sup>14</sup> With the exception of solemnizing a marriage, a notary public cannot charge more than \$10 for each notarial act.<sup>15</sup> Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree,<sup>16</sup> as anyone who impersonates a notary.<sup>17</sup>

### Suspension of a Notary

As a public officer, a notary can be suspended by the Governor for any of the grounds provided in Art. 4, s. 7, Fla. Const.<sup>18</sup> The Governor may also suspend a notary for grounds of malfeasance, misfeasance, or neglect of duty, as specified in s. 117.01(4), F.S.<sup>19</sup>

### **Effect of Bill**

The bill requires a notary to maintain a journal of notarial acts.<sup>20</sup> The journal is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signers complete address, telephone number, and specific type of identification presented by the signer.<sup>21</sup> Moreover, the notarial journal must be maintained by a notary for at least 5 years after the date of the last entry. Should a journal be stolen, lost, misplaced, destroyed, or rendered unusable, the notary is required to immediately notify the Executive Office of the Governor or the Department of State in writing of the circumstances of the incident. Finally, failure by a notary to comply with these requirements could result in the suspension or nonrenewal of the notary's public commission by the Executive Office of the Governor.

This bill permits a notary to charge \$10 per signature notarized, rather than \$10 per notarial act. However, a notary may not charge fees for services to a U.S. military veteran, firefighter, or law enforcement officer who is applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.<sup>22</sup>

### **C. SECTION DIRECTORY:**

<sup>14</sup> Section 655.94(1), F.S.

<sup>15</sup> Sections. 117.05(2)(a) and 117.045, F.S.

<sup>16</sup> Section 117.05(3)(e), F.S.

<sup>17</sup> Section 117.05(7), F.S.

<sup>18</sup> The grounds for suspension by the Governor found in Art. 4, s. 7, Fla. Const. are: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...."

<sup>19</sup> Grounds of malfeasance, misfeasance, or neglect of duty, specified in section 117.01(4), F.S., include, but are not limited to: A material false statement on the application; a complaint found to have merit by the Governor; failure to cooperate or respond to an investigation by the Governor's Office or the Department of State regarding a complaint; Official misconduct as defined in s. 838.022, F.S.; false or misleading advertising relating to notary public services; unauthorized practice of law; failure to report a change in address or telephone number within the required time or failure to request an amended commission following a name change; commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.; charging fees in excess of fees authorized by law; or failure to maintain the required bond.

<sup>20</sup> In 1998, the Legislature enacted a law that required all electronic notarizations to be logged in a journal. See, ch. 98-246, L.O.F.; s. 117.20, F.S., (1998 Supp.). Each notarial act memorialized in the journal had to include certain information and be kept at least 5 years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. See, s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* recommends that notaries voluntarily maintain a journal. *Reference Manual*, at 42.

<sup>21</sup> The National Notary Association ("NNA") compiled the Model Notary Act of 2002 which was an attempt to modernize the notary public office. The Act was the work of a drafting committee of individuals from the legal, business and governmental spheres. See [http://www.nationalnotary.org/UserImages/Model\\_Notary\\_Act.pdf](http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf) (last visited Jan. 23, 2006). The Model Notary Act, in ss. 7-1 and 7-2, requires a notary to maintain a journal and suggests that the journal contain a list of information for each act performed; which would include the thumbprint of each principal and witness in a notarial act. The thumbprint requirement, along with several other requirements, was considered controversial by the committee. Comment, s. 7-2(a), Model Notary Act. The instant bill contains no such provision.

<sup>22</sup> Section 117.05(2)(b)(2), F.S.

Section 1 amends s. 117.05, F.S., regarding notary fees.

Section 2 creates s. 117.071, F.S., to require a notary maintain a journal of each notarial act.

Section 3 provides a effective date of January 1, 2007.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

A notary public will be required to purchase a journal for notarial acts.<sup>23</sup>

### **D. FISCAL COMMENTS:**

Due to the new requirements of this bill, the amount of time necessary for a notary public to notarize a document may be increased, thereby potentially increasing the cost of businesses who rely on notary services.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

None.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

Title

---

<sup>23</sup> Journals of notarial acts can be purchased for between \$11.95, with space for over 700 entries, to \$34.99, which provides space for 775 notarizations.

The title, on lines 3-4 appears inaccurate. The title provides "requiring notaries public to charge fees per notarized signature," yet nothing in the bill requires a notary to charge a fee.

#### Department of State

The Department of State requests that line 56 of the bill be amended to read: immediately notify the Executive Office of the Governor in writing of the circumstances of the incident. This amendment is requested to avoid confusion on the part of the notary regarding who to notify if the notary journal is stolen, lost, misplaced, destroyed, or rendered unusable.

#### Public Records Laws

Under s. 119.07(1)(a), F.S.:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

As used in s. 119.07, F.S., the term:

"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.011(11), F.S.

As used in s. 119.07, F.S. the term:

"Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Section 119.011(2), F.S.

Because a notary public is a public officer under the State Constitution, the notary journal required by this bill may be a public document that must be made available for inspection and copying pursuant to Art. I, s. 21, Fla. Const. and ch. 119, F.S.

### Asserted Purpose

The *Reference Manual* drafted by the the Governor's Task Force on Notaries Public in 1989 suggested the mandatory use of journals.<sup>24</sup> Moreover, while notary journals are not required to maintain a journal under current law, the *Reference Manual* recommends "any notary who is concerned with liability may want to consider this protective measure to provide a permanent record of his or her notarial acts."<sup>25</sup> Furthermore, the National Notary Association maintains that the use of a notarial journal will assist in preventing real estate fraud. It appears that the NNA's chief tool in preventing real estate fraud is the requirement that each document signer place a thumbprint in the notarial journal; a requirement absent from this bill.

Detractors of the bill point to the increased responsibility a notary would have for each signature as being unduly cumbersome. Their concern revolves around the additional time needed for a notary need to comply with the new requirements.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

n/a

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<sup>24</sup> *Reference Manual*, at 42.

<sup>25</sup> *Id.*, at 43.

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1 A bill to be entitled

2 An act relating to notaries public; amending s. 117.05,  
3 F.S.; requiring notaries public to charge fees per  
4 notarized signature; requiring notaries public to provide  
5 services without charge to certain persons; creating s.  
6 117.071, F.S.; requiring notaries public to maintain a  
7 journal and to record notarial acts; providing  
8 requirements for journal entries; requiring retention of  
9 the journal for a specified period after the last entry  
10 and requiring certain notice upon failure to do so;  
11 providing that failure to comply with such requirements  
12 may constitute grounds for suspension or nonrenewal of the  
13 notary public commission by the Executive Office of the  
14 Governor; providing an effective date.

15  
16 Be It Enacted by the Legislature of the State of Florida:

17  
18 Section 1. Subsection (2) of section 117.05, Florida  
19 Statutes, is amended to read:

20 117.05 Use of notary commission; unlawful use; notary fee;  
21 seal; duties; employer liability; name change; advertising;  
22 photocopies; penalties.--

23 (2)(a) The fee of a notary public may not exceed \$10 per  
24 signature notarized, for any one notarial act, except as  
25 provided in s. 117.045.

26 (b) A notary public may not charge a fee:

27 1. For witnessing an absentee ballot in an election, and  
28 must witness such a ballot upon the request of an elector,

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provided the notarial act is in accordance with the provisions of this chapter.

2. For any notarial act performed for a United States military veteran or a firefighter or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

Section 2. Section 117.071, Florida Statutes, is created to read:

117.071 Use of journal for notarial acts.--

(1) Each notarial act shall be recorded by the notary public sequentially in a journal in accordance with the provisions of this chapter.

(a) For each notarial act, the notary public shall record in the journal at the time of notarization:

1. The date and time of the notarial act.

2. The type of notarial act.

3. The title or name of the document or transaction.

4. The signer's printed name and signature.

5. The signer's complete address, telephone number, and specific type of identification presented by the signer.

(b) The notary public must retain the journal for safekeeping for at least 5 years after the date of the last entry.

(c) If the notary public journal is stolen, lost, misplaced, destroyed, or rendered unusable within the time period specified in paragraph (b), the notary public must immediately notify the Executive Office of the Governor or the



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57 Department of State in writing of the circumstances of the  
58 incident.

59 (2) Failure of a notary public to comply with the  
60 requirements of this section may constitute grounds for  
61 suspension or nonrenewal of the notary public commission by the  
62 Executive Office of the Governor.

63 Section 3. This act shall take effect January 1, 2007.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. HB 0567

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1

Council/Committee hearing bill: Civil Justice Committee  
Representative(s) Kyle offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Subsection (2) of section 117.05, Florida  
Statutes, is amended to read:

117.05 Use of notary commission; unlawful use; notary fee;  
seal; duties; employer liability; name change; advertising;  
photocopies; penalties.--

(2)(a) The fee of a notary public may not exceed \$10 per  
signature notarized for any one notarial act, except as provided  
in s. 117.045.

(b) A notary public may not charge a fee:

1. For witnessing an absentee ballot in an election, and  
must witness such a ballot upon the request of an elector,  
provided the notarial act is in accordance with the provisions  
of this chapter.

2. For any notarial act performed for a United States  
military veteran or a firefighter or law enforcement officer  
applying for a pension, allotment, allowance, compensation,

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

insurance policy, or other benefit resulting from public service.

Section 2. Section 117.071, Florida Statutes, is created to read:

117.071 Use of journal for notarial acts.--

(1) Each notarial act shall be recorded by the notary public sequentially in a journal in accordance with the provisions of this chapter. A notary who is either an attorney at law licensed to practice in this state or who is employed by an attorney at law licensed to practice in this state is exempt from the requirement to keep a journal of notarial acts.

(a) For each notarial act, the notary public shall record in the journal at the time of notarization:

1. The date and time of the notarial act.
2. The type of notarial act.
3. The title or name of the document or transaction.
4. The signer's printed name and signature.
5. The signer's complete address, telephone number, and specific type of identification presented by the signer.

(b) The notary public must retain the journal for safekeeping for at least 5 years after the date of the last entry.

(c) If the notary public journal is stolen, lost, misplaced, destroyed, or rendered unusable within the time period specified in paragraph (b), the notary public must immediately notify the Executive Office of the Governor in writing of the circumstances of the incident.

(2) Failure of a notary public to comply with the requirements of this section may constitute grounds for suspension or nonrenewal of the notary public commission by the Executive Office of the Governor.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

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Section 3. This act shall take effect January 1, 2007.

===== T I T L E A M E N D M E N T =====

Remove the entire title and insert:

An act relating to notaries public; amending s. 117.05, F.S.; authorizing notaries public to charge a fee per notarized signature; requiring notaries public to provide services without charge to certain persons; creating s. 117.071, F.S.; requiring notaries public to maintain a journal and to record notarial acts; providing an exception; providing requirements for journal entries; requiring retention of the journal for a specified period after the last entry and requiring certain notice upon failure to do so; providing that failure to comply with such requirements may constitute grounds for suspension or nonrenewal of the notary public commission by the Executive Office of the Governor; providing an effective date.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 673                      Residential Tenancies  
**SPONSOR(S):** Stargel  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** None

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Poblete	Bond
2) Business Regulation Committee			
3) Justice Council			
4)			
5)			

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### SUMMARY ANALYSIS

Current residential landlord-tenant law does not provide for a landlord and a tenant to contract for liquidated damages in the event a rental agreement is breached by early termination. A liquidated damages clause is a means for two parties to a contract to agree in advance what the damages are for a future breach of the contract.

This bill amends residential landlord-tenant law to provide that landlords and tenants may contract for liquidated damages. The total liquidated damages and any early termination fee cannot exceed two months' rent. Alternatively, a landlord may elect, upon early termination by a tenant, to collect any unpaid rent, other charges that may be due under the rental agreement, and any rental concessions that the tenant has received.

This bill does not appear to have a fiscal impact on state or local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – This bill increases the ability of landlords and tenants to enter into contract terms as they see fit.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

The 1973 Florida Residential Landlord and Tenant Act governs residential landlord-tenant law.<sup>1</sup> A rental agreement specifies the terms and conditions of a tenant's occupation in a dwelling unit for a specific period of time. Should a tenant breach a rental agreement by leaving prior to the end of the rental term, a landlord may choose one of three remedies provided in s. 83.595, F.S.:

- Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or
- Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from renting to another tenant; or
- Stand by and do nothing, holding the tenant liable for the rent as it comes due.

A clause for liquidated damages is a means for two parties to a contract to agree in advance what the damages are for a future breach of the contract. A liquidated damages clause is incorporated into a contract because it provides the following benefits<sup>2</sup>:

- The establishment of an exact amount of recovery in the event of a breach.
- The simplification or elimination of the need to prove actual damages, thereby leading to a reduction in the costs, time, and inconvenience of litigation.
- The reinforcement of contractual obligations and added deterrence to breach.

Section 83.47(1)(a), F.S., provides that to the extent any provision in a rental agreement purports to waive or preclude the rights, remedies, and requirements set forth in the Florida Residential Landlord and Tenant Act, that provision is void and unenforceable. Section 83.47(1)(b), F.S., also makes void and unenforceable any provision that purports to limit or preclude any liability arising under law between a landlord and a tenant.

In 2004, a circuit court in Palm Beach found that the remedies set forth in s. 83.595, F.S., are exclusive because s. 83.47, F.S., prohibits rental agreement terms that conflict with specific rights in the Florida Residential Landlord and Tenant Act, including those regarding liquidated damages. This class action judgment therefore found a liquidated damages clause in a landlord's standard lease agreement to be invalid.<sup>3</sup>

##### **Effect of Bill**

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<sup>1</sup> Part II of ch. 83, F.S.

<sup>2</sup> Luepke, Henry F., "How to Draft and Enforce a Liquidated Damages Clause." 61 J. Mo. B. 324

<sup>3</sup> Order dated December 1, 2004, in *Yates v. Equity Residential Properties Trust*, 15<sup>th</sup> Judicial Circuit in and for Palm Beach County, Florida, Case No. 502002CA014116XXOCAB. Equity's standard lease had two separate fees that, in effect, charged a tenant 3 months rent as a penalty for early termination of the lease.

This bill amends s. 83.595, F.S., to provide a landlord two additional remedies in the event a tenant breaches a rental agreement by leaving prior to the end of the rental term.

This bill creates paragraph (d) which provides that a landlord and a tenant may contract for liquidated damages. A landlord is entitled to both liquidated damages and an early termination fee if specified in the rental agreement and the total amount charged does not exceed an amount equal to two months' rent. If a landlord elects this remedy, the landlord must treat the rental agreement as terminated, and the other remedies listed provided for s. 83.595(1)(a)-(c) are no longer available to the landlord. This remedy does not apply when the breach is a failure to give notice of the end of the rental agreement as provided in s. 83.575, F.S.<sup>4</sup>

This bill also creates paragraph (e) to provide a landlord another alternative remedy upon early termination by a tenant. The paragraph provides that a landlord may charge a tenant for any unpaid rent, other charges that may be due under the rental agreement, and any rental concessions that the tenant has received in consideration for entering into the rental agreement. Rental concessions include any amount by which all or part of the base rent, options, or fees are reduced in exchange for entering into the rental agreement.

**C. SECTION DIRECTORY:**

Section 1 amends s. 83.595, F.S., to allow a landlord and a tenant to contract for liquidated damages or charge certain fees in the event a tenant breaches a rental agreement by early termination.

Section 2 provides an effective date of July 1, 2006.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**FISCAL COMMENTS:**

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<sup>4</sup> Section 83.575, F.S., allows for a rental agreement provision requiring a tenant to notify a landlord before vacating the premises at the end of a rental term. The provision may not require more than 60 days' notice. A landlord must provide written notice to a tenant specifying the obligations under the notification provision as well as the termination date. If, after written notice, a tenant breaches such a provision, the tenant may be liable for liquidated damages as specified in the rental agreement.



None.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

It is unclear whether rental agreements executed prior to the effective date of the bill will be affected by this bill.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

n/a

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A bill to be entitled

An act relating to residential tenancies; amending s. 83.595, F.S.; allowing a landlord to terminate a rental agreement and recover liquidated damages for breach of the agreement or charge the tenant an early termination fee, or both, under certain circumstances; providing a limit on the combined total damages and fee; specifying liability of the tenant for rent, other charges otherwise due, and rental concessions under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 83.595, Florida Statutes, is amended to read:

83.595 Choice of remedies upon breach by tenant.--

(1) If the tenant breaches the rental agreement ~~lease~~ for the dwelling unit and the landlord has obtained a writ of possession, or the tenant has surrendered possession of the dwelling unit to the landlord, or the tenant has abandoned the dwelling unit, the landlord may:

(a) Treat the rental agreement ~~lease~~ as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; ~~or~~

(b) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between the rent ~~rental~~ stipulated to be paid under the rental ~~lease~~ agreement and what, in good faith, the landlord is able to

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recover from a reletting; ~~or~~

(c) Stand by and do nothing, holding the lessee liable for the rent as it comes due;~~-~~

(d) If provided for in the rental agreement, recover liquidated damages upon the breach or charge the tenant a fee for early termination of the rental agreement upon the tenant's giving the landlord notice as provided for in the rental agreement. The landlord shall be entitled to both liquidated damages and an early termination fee, provided the combined total for liquidated damages and the early termination fee does not exceed an amount equal to 2 months' rent. The landlord shall treat such a rental agreement as terminated and charge the tenant liquidated damages or the early termination fee as specified in the rental agreement. In such event, the remedies set forth in paragraphs (a), (b), and (c) are not available to the landlord. This paragraph shall not apply when the breach is failure to give notice at the end of the rental agreement as provided in s. 83.575; or

(e) Charge the tenant for any unpaid rent, other charges due under the rental agreement through the end of the month in which the landlord retakes possession of the dwelling unit, and any rental concessions that the tenant has received. For purposes of this paragraph, the term "rental concessions" means any amount by which all or a portion of the base rent, options, or fees is reduced in consideration for the tenant entering into the rental agreement.

(2) If the landlord retakes possession of the dwelling unit for the account of the tenant pursuant to paragraph (1)(b),

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57 the landlord has a duty to exercise good faith in attempting to  
58 relet the premises, and any rent ~~rentals~~ received by the  
59 landlord as a result of the reletting shall be deducted from the  
60 balance of rent due from the tenant. For purposes of this  
61 section, "good faith in attempting to relet the premises" means  
62 that the landlord shall use at least the same efforts to relet  
63 the premises as were used in the initial rental or at least the  
64 same efforts as the landlord uses in attempting to rent lease  
65 other similar rental units but does not require the landlord to  
66 give a preference in leasing the premises over other vacant  
67 dwelling units that the landlord owns or has the responsibility  
68 to rent.

69       Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. 0673

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1

Council/Committee hearing bill: Civil Justice Committee  
Representative Stargel offered the following:

**Amendment (with title amendment)**

Remove lines 31-69 and insert:

the rent as it comes due; or-

(d) If provided for in the rental agreement, recover liquidated damages upon the breach or charge the tenant a fee for early termination of the rental agreement upon the tenant's giving the landlord notice as provided for in the rental agreement. The landlord shall be entitled to both liquidated damages and an early termination fee, provided the combined total for liquidated damages and the early termination fee does not exceed an amount equal to 2 months' rent. The landlord shall treat such a rental agreement as terminated and charge the tenant liquidated damages or the early termination fee as specified in the rental agreement. In such event, the remedies set forth in paragraphs (a), (b), and (c) are not available to the landlord. This paragraph shall not apply when the breach is failure to give notice at the end of the rental agreement as provided in s. 83.575.

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

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22       (2) The landlord may charge the tenant for any unpaid  
23 rent, other charges due under the rental agreement through the  
24 end of the month in which the landlord retakes possession of the  
25 dwelling unit, and any rental concessions that the tenant has  
26 received. For purposes of this subsection, the term "rental  
27 concessions" means any amount by which all or a portion of the  
28 base rent, options, or fees is reduced in consideration for the  
29 tenant's entering into the rental agreement.

30       (3)(2) If the landlord retakes possession of the dwelling  
31 unit for the account of the tenant pursuant to paragraph (1)(b),  
32 the landlord has a duty to exercise good faith in attempting to  
33 relet the premises, and any rent ~~rentals~~ received by the  
34 landlord as a result of the reletting shall be deducted from the  
35 balance of rent due from the tenant. For purposes of this  
36 section, "good faith in attempting to relet the premises" means  
37 that the landlord shall use at least the same efforts to relet  
38 the premises as were used in the initial rental or at least the  
39 same efforts as the landlord uses in attempting to rent ~~lease~~  
40 other similar rental units but does not require the landlord to  
41 give a preference in leasing the premises over other vacant  
42 dwelling units that the landlord owns or has the responsibility  
43 to rent.

44       Section 2. This act shall take effect upon becoming a law  
45 and shall apply to any rental agreement entered into prior to  
46 the effective date of this act in which the parties agreed to  
47 the remedies authorized in this act.

48  
49 ===== T I T L E   A M E N D M E N T =====

50       Remove line 10 and insert:  
51 application; providing an effective date.

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HB 0673 Amendment 1